

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

WYNN'S EXTENDED CARE, INC., Civil No. 5:13cv00114

Plaintiff,

vs. Harrisonburg, Virginia

PENNY L. BRADLEY,

Defendant. November 6, 2014

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE MICHAEL F. URBANSKI
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by mechanical stenography;
transcript produced by computer.

1 THE COURT: Good morning.

2 Please call the case.

3 THE CLERK: Yes, Your Honor.

4 This is Civil Action Number 5:13cv00114,

5 Wynn's Extended Care, Inc., vs. Penny L. Bradley.

6 THE COURT: Good morning, folks.

7 This case is here today principally on the
8 motion for summary judgment. There's been motions for
9 summary judgment filed by both parties.

10 The Court has read all the briefs. I have
11 read lots of Virginia Supreme Court cases and other
12 cases on the issues. I have read the attachments. I'm
13 very familiar with the facts of this case and the Court
14 wants to hear argument on summary judgment. The
15 principle issue on summary judgment is whether or not
16 the plaintiffs can -- whether there is a genuine issue
17 of material fact from which a reasonable jury could
18 conclude the existence of an agency relationship on
19 behalf of -- with Wynn's as principle and Armstrong Auto
20 as agent, under the facts of this case, with regard to
21 the two representations that have been alleged in the
22 fraud and the constructive fraud allegations in this
23 case and that is; one, paragraph 82, Wynn's agent
24 misrepresented both orally and in writing that
25 24 months, 24000-mile coverage was included in the

1 transaction; paragraph 83, that Wynn's authorized that
2 transaction; paragraph 86, Wynn's misrepresented that
3 the August 28 letter was in error and that it should be
4 ignored.

5 Those are the representations alleged in the
6 counterclaim.

7 So the issue as to the first cause of
8 action, it also goes to the issue under the VCPA,
9 whether there's sufficient evidence to get to the jury
10 from which a reasonable trier of fact could conclude the
11 defendant in this case, Penny Bradley, has met her
12 burden of proving the existence of an agency
13 relationship. That's the first issue.

14 Then if you get past the issue of agency,
15 there's the issue of reasonable reliance. I know that
16 was dealt with to some extent in the motion to dismiss
17 in this case, but now we're at the Rule 56 stage, so we
18 have to consider the issue of reasonable reliance on the
19 alleged representations.

20 Then the issue under the Magnuson-Moss, the
21 third cause of action is whether or not there was a
22 contract here or whether or not it is merely an
23 application that was denied by Wynn's because the
24 vehicle was ineligible as being an electric vehicle.

25 So, those are the issues I want to hear

1 argument on this morning. I want to hear from Wynn's
2 first.

3 MR. CARSTENS: Good morning, Your Honor.

4 I'm John Carstens with Jordan Coyne. I'm here on behalf
5 of Wynn's on the motion for summary judgment.

6 THE COURT: Good morning, sir. I'm not sure
7 we've met, but nice to see you.

8 Have you been here before on this case?

9 MR. CARSTENS: I was at one of the hearings.

10 THE COURT: But Ms. Sadler did all the
11 talking.

12 MR. CARSTENS: She did, and I hope to not
13 mess this up at this point, Your Honor.

14 I think Your Honor has identified the three
15 critical issues here. We submit that Armstrong is not
16 our agent as a matter of law. I think the Court needs
17 to look no further than the Murphy vs. Holiday Inn case
18 for our position. In that case, the Virginia Supreme
19 Court said --

20 THE COURT: Hold on. Give me the cite to
21 that case, would you?

22 MR. CARSTENS: It's 216 Virginia 490.

23 THE COURT: I read so many cases over the
24 past few days. Let me just pull that up on my computer.
25 Hold on. I was reading cases that went back a hundred

1 years on the issue of agency.

2 MR. CARSTENS: Good jurisprudence in
3 Virginia.

4 THE COURT: Go ahead.

5 MR. CARSTENS: That's a slip and fall case
6 where the patron at the Holiday Inn slipped and fell,
7 sued Holiday Inn under a theory of agency and the
8 Supreme Court said when there's a question of agency or
9 not, when it rests upon unambiguous written documents
10 and inferences deducible from those documents, then it's
11 a question of law for the Court.

12 THE COURT: You know, I think agency is a
13 question of law for the Court in this case and
14 particularly so because the undisputed evidence is
15 Armstrong and Wynn's never had any conversations.

16 MR. CARSTENS: Correct.

17 THE COURT: Armstrong testified in his
18 deposition, and I read a lot of these depositions in
19 this case -- the guy from CAC, the one in Florida from
20 Wynn's. I read Ms. Bradley's. I looked at Mr.
21 Armstrong's. Armstrong says the only time they ever
22 talked to Wynn's was after Ms. Bradley's car broke in
23 January of the next year and they said, you know, is
24 this thing covered? What we have here is the papers with
25 regard to the existence of agency.

1 MR. CARSTENS: Correct.

2 So, if you look at our dealer agreement and
3 compare it to the summary of the franchise agreement in
4 Murphy vs. Holiday Inn and the Supreme Court found it
5 affirmed the summary judgment, granting the summary
6 judgment for Holiday Inn finding that that franchise
7 contract in that case did not create an agency
8 relationship. In that case --

9 THE COURT: You know, there's another issue,
10 too, that I don't want to forget about. I'm sorry.
11 I've been thinking about this case. The other issue is
12 this. Even if an agency relationship existed, can
13 Wynn's be bound by actions taken by Armstrong that
14 exceeded the scope of the agency relationship. Because
15 even if the Court were to find there was an agency
16 relationship, this agreement says that Armstrong, the
17 dealer, can only issue sales contracts based on eligible
18 vehicles.

19 MR. CARSTENS: Correct.

20 THE COURT: This vehicle wasn't eligible.

21 MR. CARSTENS: Correct.

22 THE COURT: So, even if there was an agency
23 relationship, didn't he exceed the scope? Armstrong?

24 MR. CARSTENS: That's correct, Your Honor.

25 THE COURT: I don't want to lose sight of

1 that.

2 Go ahead.

3 MR. CARSTENS: In that case, Holiday Inn had
4 a lot of authority under the franchise agreement. It
5 got to dictate the building, the signage. It actually
6 provided the training for the management, the
7 housekeeper and the restaurant management, even though
8 the licensee had to pay for the training, but they
9 provided that. They provided stationary. They provided
10 advertising. They provided the color scheme for the
11 hotel. They wanted to make sure that if their trade
12 name was on this building that it met certain standards
13 and they took steps under their franchise agreement and
14 had the right to take those steps under the franchise
15 agreement to do that. The Virginia Supreme Court says
16 that's not controlling the means and methods of carrying
17 out the agreement and therefore, there is no agency
18 relationship.

19 Compare that to what we have in our case,
20 this dealer agreement. The dealer agreement is that
21 Armstrong Auto agrees to market our extended service
22 contract.

23 THE COURT: The dealer will use its best
24 efforts to market Wynn's service contract.

25 MR. CARSTENS: Correct.

1 And the dealer agrees to use certain forms
2 in entering into these agreements. He agrees not to
3 vary from the prices set by the contract. He agrees
4 that he cannot change the terms and conditions of the
5 contract. He agrees that he has not authority to bind
6 the company, that it's not a valid contract until it is
7 accepted by the company. That's what's in there, in
8 that agreement. The other items are, well, how do we
9 transmit the money, when do we transmit the money, who
10 gets the credit for the money? It's all typical indicia
11 of somebody that's an independent contractor. There is
12 no control of the means and method.

13 The other four factors we deal with in
14 typical agency relationships -- power to hire, fire. In
15 the Holiday Inn case, Holiday Inn put in their agreement
16 that the franchisee or the licensee in that case would
17 not hire anybody that was contemporaneously working for
18 a competitor. So, if you had a night clerk working for
19 you at the Holiday Inn, that person couldn't work as a
20 desk clerk at the Super 8 Motel down the block under
21 that agreement. So they had some control over who the
22 licensee could hire and there is no evidence in this
23 case whatsoever about any type of control like that.

24 THE COURT: Look at paragraph 1A of the
25 dealer agreement. I have it attached at Document 63,

1 attached to the Declaration of R. Steven Brooks. It's
2 in the record at a lot of different places, but this is
3 the one I'm looking at. It says, 1A, marketing program.
4 Dealer will use its best efforts to market Wynn's
5 service contracts pursuant to the program and faithfully
6 perform its duties in compliance with the administrator's
7 instructions and procedures.

8 Does that give rise to sufficient indicia of
9 control to create an agency relationship?

10 MR. CARSTENS: It does not, Your Honor.

11 That similar type of condition was in that
12 franchise agreement in the Murphy case. In that case,
13 the licensee agreed to conduct its business consistent
14 with the system established by Holiday Inn. Holiday Inn
15 had the right to come on the premises periodically to do
16 inspections to make sure they were following the
17 procedures and the accepted practices that were
18 established by Holiday Inn. Again, Holiday Inn came on
19 and trained the manager, the restaurant manager and the
20 housekeeping people to make sure that certain standards
21 were being met.

22 THE COURT: But there's no evidence of any
23 of that here.

24 MR. CARSTENS: Correct.

25 THE COURT: When you talk about this

1 particular language in the contract, it says
2 instructions and procedures. There's no evidence of any
3 instructions.

4 MR. CARSTENS: The instructions in the
5 agreement is you're not to sell a contract on an
6 ineligible vehicle. That's the instruction.

7 THE COURT: And you send the money off to
8 CAC.

9 MR. CARSTENS: Correct.

10 THE COURT: Wynn's doesn't even deal with
11 Armstrong.

12 MR. CARSTENS: Correct. The money goes to
13 CAC.

14 THE COURT: The money goes to CAC. CAC
15 sends some money to Wynn's. Wynn's keeps a little bit
16 of that money, \$80, for its service charge, puts the
17 rest in reserve and then there's a chunk of money the
18 dealer gets and CAC finances some of that money.

19 MR. CARSTENS: Correct.

20 THE COURT: There's no magic or secret here.
21 That's the way it works.

22 MR. CARSTENS: Exactly.

23 THE COURT: Wynn's doesn't even deal with
24 these people. There's no evidence they ever even spoke
25 to them.

1 MR. CARSTENS: That is correct.

2 THE COURT: I was trying to think about this
3 last night and I was trying to think about the law and
4 take a step back. Why does it make sense in this case
5 or does it make sense in this case for Wynn's to be
6 bound by representations made from this dealer on the
7 street, representations that are, A, inconsistent with
8 the documents themselves. And I was trying to think
9 about it. The Virginia Supreme Court has keyed in on
10 control. One of the factors it talks about in these
11 cases on agency is control. And there isn't any
12 evidence of control in this case.

13 MR. CARSTENS: Correct, Your Honor.

17 Control matters because if Wynn's has the
18 ability to dictate and control what Armstrong does, then
19 Wynn's ought to be bound by what Armstrong says. But
20 here, Wynn's has no control over Armstrong. All
21 Armstrong has the ability to do is market these programs
22 and offer them to people who want to buy them with the
23 car. Send it off to Wynn's for approval or not. That's
24 what this document says.

25 I just don't see where there's any evidence

1 of control. I don't see why Wynn's should be bound by
2 reps of Armstrong that are; A, inconsistent with the
3 documents; and B, where Wynn's doesn't control them.

4 MR. CARSTENS: That is our position exactly.

5 The only thing that Wynn's could do would be
6 to terminate the contract. That's their only recourse
7 if they find that somebody is acting inconsistent, which
8 is totally inconsistent with an independent contractor
9 agreement. Somebody violates their independent
10 contract, you terminate the contract. There is no
11 coming in and doing remediation, putting people on
12 suspension, doing anything like that.

13 THE COURT: But Ms. Bradley argues, look,
14 Wynn's authorizes Armstrong to sell these contracts.
15 They authorize them to determine how much it cost. They
16 authorize them to pick the coverage that's available and
17 therefore, they should be held to be their agent.
18 That's the gist of their argument, that they're out
19 there. Really, we're talking about actual agency out
20 there.

21 Go ahead.

22 How would you deal with that?

23 MR. CARSTENS: In terms of that, a couple of
24 those things are inaccurate. One is that they don't get
25 to set the price. The price is set by the terms of the

1 agreement, by that rate sheet. So it's not that
2 something --

3 THE COURT: The rate sheet that they say
4 doesn't exist.

5 MR. CARSTENS: Well, no, there -- I may be
6 using the wrong term, but there is a sheet that the
7 dealer gets on which the price is set out.

8 THE COURT: It was attached to that same
9 Brooks affidavit.

10 MR. CARSTENS: Correct.

11 THE COURT: It's part of the dealer
12 agreement. It's this page.

13 MR. CARSTENS: That's correct.

14 So, that is not an issue. They can't change
15 any of the terms of the agreement. The only thing they
16 could put in there is the length of the contract,
17 whether it's 24 months and 24000 miles, whether it's
18 12 months and 12000 miles or some other combination.
19 Whatever the customer picks for the length of the
20 contract is what they put in there and that's going to
21 drive the price of the contract. They have no
22 discretion or authority to change that. Again, there
23 was no representations made to Ms. Bradley that they
24 somehow were cloaked with such authority to do that.
25 The agreement clearly says they have no ability to bind

1 the company at all, that it's not a contract until the
2 application has been accepted. We know in this case
3 it's undisputed that the vehicle that they sought to
4 cover under the contract was ineligible. That's an
5 undisputed fact. And it's also undisputed that Ms.
6 Bradley got notice the application was rejected within
7 seven days of the transaction. It went out in seven
8 days. She got it maybe a week or so later. Those are
9 all undisputed facts.

10 So what we have is somebody who offers a
11 product for sale. I go down to the local Food Lion and
12 buy Green Giant vegetables or something like that. I
13 don't believe that Food Lion is an agent of Green Giant.
14 There's no reasonable belief under those circumstances
15 that they're anything other than an independent store
16 that is offering something for sale. So there is no
17 agency relationship.

18 THE COURT: What if the box of Green Giant
19 beans that you're buying at the grocery store has a
20 label on the box that says, to use your example, that
21 says, "contains no peanuts." Food Lion sells that and
22 Green Giant's box has "contains no peanuts" on it.
23 Let's say it has peanuts in it and someone has a peanut
24 allergy and that person gets very sick. Is Food Lion
25 liable for selling that?

1 MR. CARSTENS: That's a separate theory of
2 liability. There's an implied warranty of wholesomeness
3 that attaches under those circumstances.

4 THE COURT: But not under an agency theory.

5 MR. CARSTENS: Correct.

6 THE COURT: It would be implied -- let's say
7 they get sued for fraud. Let's say Green Giant gets
8 sued for fraud. That's what this case is. Can Food
9 Lion be held liable for any fraud theory, for selling --
10 you brought this up, I'm just going with it -- for
11 selling the green beans with the peanuts in them?

12 MR. CARSTENS: I don't believe they can
13 unless they knew that there were peanuts in there and
14 continued to sell them after with knowledge of the
15 peanuts. Under those circumstances, possibly, under
16 those circumstances.

17 THE COURT: How does fraud make any sense in
18 this case with regard to the representation in paragraph
19 86 of the counterclaim where it says Wynn's
20 misrepresented that the August 28th letter was in error
21 and should be ignored? That's nonsense. Wynn's wrote
22 the letter and said this vehicle is ineligible and it is
23 cancelled and then Ms. Bradley goes over to Armstrong
24 and says, and what about this letter and they say, oh,
25 don't worry, it's a computer glitch? How can Wynn's be

1 liable in fraud for writing a clear letter that says
2 there's no coverage here? And then go to somebody else,
3 the car dealer, and have the car dealer bind Wynn's for
4 making a representation that's inconsistent with the
5 writing? That's nonsense.

6 MR. CARSTENS: I agree, Your Honor.

7 THE COURT: It's nonsense.

8 MR. CARSTENS: I agree.

9 THE COURT: I mean, this is a case against
10 the car dealer. I mean, if there's any liability here,
11 and I feel bad for Ms. Bradley because Ms. Bradley
12 didn't want to buy a car that didn't have a warranty
13 with it. She says that. Armstrong sells her one.
14 Whether Armstrong was mistaken or not, I don't know, but
15 Armstrong sells her one and he sells her this car and
16 then when she gets this notice -- he sells her a car
17 that's not eligible, for which there's no eligible
18 warranty. When she gets this notice that says there's
19 no warranty, Armstrong says, hey, don't worry about
20 that.

21 If there's a case here, it's against
22 Armstrong. I don't see how Wynn's has any liability at
23 all for the fraud in this case. I don't.

24 Let's talk about the Magnuson-Moss for a
25 minute. Let's talk about that.

1 MR. CARSTENS: Magnuson-Moss, there has to
2 be a contract. The argument is, quite frankly, there is
3 no contract here because there's an application. When
4 Ms. Bradley signs the application, she acknowledges that
5 it's an application for insurance.

6 THE COURT: It says contract/application.

7 MR. CARSTENS: It does, but then it says
8 this is an application which will become your contract
9 upon acceptance -- only upon acceptance by us. She
10 acknowledges right above her signature -- let me get to
11 that.

12 THE COURT: You know, there's no question
13 she had an opportunity to read this. There's no
14 question she had an opportunity to read it. I know in
15 the other case before I sent it off to arbitration,
16 there was some argument that Mr. Armstrong held his arm
17 over the arbitration provision when the contract was
18 executed, but she took it home. She had an opportunity
19 to look at it. She says when asked in deposition about,
20 you know, let's go back to the other issue about was the
21 warranty included in the sales price or was it
22 separately an optional coverage clause? And it's clear
23 from the financing statement, it's optional coverage and
24 it says it there. Optional coverage. It says in the
25 retail financing agreement, this is optional coverage.

1 She says, well, I didn't pay any attention to that.

2 Well, it's kind of hard for me to see how
3 paragraph 82 can be -- the representation that Wynn's
4 agent misrepresented that this coverage was included in
5 the transaction. I mean, sure, it was included in the
6 transaction, but it was a separate optional coverage
7 that was purchased. That's clear from the documents. I
8 don't know how she could reasonably rely on anything
9 different.

10 MR. CARSTENS: Correct. It's in three
11 places. It's in the bill of sale. It's broken out
12 there. It's in the retail installment agreement that
13 she signed where she specifically initialed it and
14 acknowledged that this service contract was not a
15 condition of getting the financing and she acknowledged
16 that also in the application that she signed for Wynn's
17 where she said she understood that this contract was not
18 a condition of obtaining financing on the vehicle.
19 That's in the language right above where she signed
20 where she also acknowledged that it was not a contract
21 until accepted.

22 THE COURT: I understand the above
23 information may be subject to verification and this
24 application may be rejected if any of the above
25 information is incorrect or if the vehicle is not

1 eligible for the term of coverage written.

2 What else could Wynn's have done? Wynn's
3 gets the contract. He wrote it up on a vehicle that
4 wasn't eligible. Wynn's immediately says it's not
5 eligible, writes a letter and says it's not eligible and
6 Armstrong ignores that.

7 Let's hear what Ms. Bradley has to say.

8 Thank you, Mr. Carstens.

9 MR. CARSTENS: Thank you, Your Honor.

10 THE COURT: Mr. Domonoske, you've heard some
11 of the Court's concerns about your fraud and
12 Magnuson-Moss case. Let's hear what you have to say.

13 MR. DOMONOSKE: Thank you, Your Honor.

14 First, let me correct one not clear aspect
15 of our complaint.

16 We were never going forward on the theory
17 that there was a claim for relief based upon the
18 statement that was initially made to her that she
19 thought it would be part of the deal. In the
20 counterclaim, the part that you just read where the
21 allegation is that he represented it was part of the
22 deal, the transaction, what that's referring to is the
23 entire transaction, the total price that was paid on the
24 contract. That's not an effort to look back at how the
25 initial conversation developed between her and

1 Armstrong. The initial conversation was, she said, I
2 want a warranty. She thought a warranty would be
3 included in the price of the car. The documents
4 eventually broke that warranty out as a separate price
5 and we are not making claims based upon her initial
6 belief that it was included in the price of the car.
7 Where we say included in the transaction, we're just
8 simply asserting the undisputed fact that at the bottom
9 of that document, there's a number that's owed and that
10 number includes all the stuff above it, which includes
11 the service contract, because it ended up --

12 THE COURT: I'm just looking at what you
13 alleged.

14 MR. DOMONOSKE: Can you read it to me,
15 please?

16 THE COURT: Paragraph 82. There's only two
17 reps in here. It doesn't say -- I mean, there's no
18 allegation in this case in your claims that Wynn's
19 representative represented that this vehicle was
20 eligible or that Wynn's representative represented that
21 this vehicle is covered. What you allege in paragraph
22 82 is Wynn's agent misrepresented, both orally and in
23 writing, that 24 months/24000 miles coverage was
24 included in the transaction.

25 MR. DOMONOSKE: Yes, Your Honor, and it's in

1 writing in the retail installment sale contract. It's
2 in writing in the buyer's order. It's in writing where
3 she signs and pays the down payment.

4 THE COURT: And it says right on there it's
5 optional coverage. It's optional coverage and she signs
6 right below it.

7 MR. DOMONOSKE: It's included because she
8 chose the option.

9 THE COURT: Okay, fine. Where's the
10 misrepresentation? Where is it? What is a material
11 misrepresentation there?

12 She signs a document that says I'm buying
13 optional coverage. She signs an agreement with Wynn's
14 that says, okay, this is an application and if it's not
15 accepted, we can reject it. Then they reject it.

16 Where's the fraud? What did Wynn's do?

17 MR. DOMONOSKE: That's a different question.
18 I can answer what Wynn's did or I can answer your
19 question, what did she rely on to her detriment.

20 THE COURT: You answer however you want to,
21 Mr. Domonoske. I want to hear what you have to say.

22 MR. DOMONOSKE: She relied to her detriment
23 on his specific statement that the vehicle was eligible
24 for coverage. That statement is undisputed. It's in
25 her deposition. It's in Travis' deposition. It's before

1 the Court in the documents and it's alleged in the
2 counterclaim.

3 THE COURT: Why, sir, is Wynn's responsible
4 for that alleged misrepresentation? Why is Wynn's
5 responsible for that?

6 MR. DOMONOSKE: Your Honor, it is not an
7 alleged misrepresentation when the two people who were
8 there both admit it happened.

9 THE COURT: Fine. Call it a
10 misrepresentation. Take out the "alleged" in my
11 question. Why is Wynn's responsible for Armstrong's
12 error or mistake or fraud or whatever you want to call
13 it? Why is Wynn's responsible because Armstrong messed
14 up and told her the vehicle was eligible and it wasn't?

15 MR. DOMONOSKE: Because of the law of
16 agency, which is what we're here to talk about today.

17 Under Virginia, the law of agency, there are
18 three different fundamental analysis. One is actual
19 agency. One is apparent authority of an actual agent.

20 THE COURT: Based on actions of the
21 principle.

22 MR. DOMONOSKE: Yes.

23 THE COURT: Based on actions of the
24 principle.

25 Okay. Go ahead.

1 MR. DOMONOSKE: The third is what's called
2 agency by estoppel.

5 MR. DOMONOSKE: Virginia Supreme Court said
6 on the specific facts on a medical malpractice case,
7 that didn't apply to a hospital. I was first just
8 referencing --

13 Let's take actual agency first.

14 MR. DOMONOSKE: We'll take actual agency
15 first because I think that's where the analysis starts.
16 Actual agency is going to start with this dealer
17 agreement. The dealer agreement appeared for the first
18 time as an exhibit to a motion to dismiss,
19 Document 19.1. The dealer agreement authorizes actions
20 by Armstrong for Wynn's behalf and that dealer agreement
21 is fundamentally different than the Holiday Inn case.
22 It's fundamentally different than when I buy my peas at
23 the Friendly City Food Co-op, and here's why. I go to
24 the Friendly City Food Co-op and I buy peas made by some
25 third party company. I have an agreement with the

1 Friendly City Food Co-op. They have a price in cash
2 because I don't believe people should support credit
3 card companies when they're supporting their downtown
4 local businesses. They get my dollars. I walk home. I
5 have the peas.

9 MR. DOMONOSKE: Yes, sir.

10 THE COURT: God love you. Go ahead.

11 MR. DOMONOSKE: When I have those peas at
12 home there on the shelf, my wife and I have a dinner
13 conversation. And in my house --

14 THE COURT: They're probably not frozen.
15 They're fresh.

16 MR. DOMONOSKE: They're fresh.

17 THE COURT: Absolutely.

18 MR. DOMONOSKE: And when we have a dinner
19 conversation in my house, we actually have rules that we
20 follow when we have the dinner conversation.

21 THE COURT: No television.

22 MR. DOMONOSKE: No, sir.

23 THE COURT: Certainly. Go ahead.

24 MR. DOMONOSKE: There are actually positive
25 rules and how you conduct the nature of the conversation

1 in order to get to a good result.

2 THE COURT: I could learn from you,
3 Mr. Domonoske.

4 MR. DOMONOSKE: When we decide we're having
5 the peas for dinner, the pea manufacturer cannot call us
6 up and say, oh, by the way, you never actually bought
7 the peas, we want them back. The fundamental nature of
8 the contract is when I'm at Friendly City Food Co-Op, it
9 doesn't matter where they buy their stuff. I have a
10 contract with them. I trade dollars for good food.

11 The Holiday Inn case, when the victim, the
12 plaintiff, tried to sue Holiday Inn, under a theory that
13 was not allowed, which we do not dispute in any way that
14 analysis, that analysis doesn't apply to this case
15 because that plaintiff did not have a contract with
16 Holiday Inn, the company that was being solicited and
17 explained to him by the local Holiday Inn. For
18 instance, the Holiday Inn, the company that was the
19 defendant in that case, could not call him up in the
20 middle of the night and say, you're not allowed to stay
21 at our hotel. We're cancelling the contract. They were
22 wrong to let you in, because the nature of the agreement
23 was not between that plaintiff and the principle that
24 they were trying to allege was the principle.

25 It is the same in all the cases. The

1 med/mal case, the person who was at the hospital, that
2 hospital that they tried to get for the liability for
3 the doctors' negligence did not control the relationship
4 between the plaintiff and the doctor. They couldn't
5 say, you're not allowed to have that doctor treat you.

6 What our case is exactly like is the
7 fundamental dynamics of Nationwide. If you are looking
8 back more than a hundred years, you may have read the
9 case Harden v. Alexandria Insurance Company. I
10 referenced that because --

11 THE COURT: What's the case where these
12 folks have represented to the insurance agents?
13 Nationwide says right out there we are insurance agents.
14 Nationwide represents these people as being insurance
15 agents. This contract says there's no agency here.

16 MR. DOMONOSKE: When you say this contract,
17 are you referring to the dealer agreement?

18 THE COURT: The dealer contract says that
19 and the contract with Ms. Bradley says, I understand
20 that this is subject to verification and if it's
21 incorrect or if it's not eligible, no deal. And they
22 did that and they wrote her a letter and said no deal.
23 Then you're trying to hold Wynn's responsible because
24 Armstrong said ignore what Wynn's said? Armstrong says
25 just ignore that, it's a computer glitch.

1 The person who's responsible here, if it's
2 anybody, is Armstrong. Wynn's did exactly what the
3 contract document said it would do. Looked at the
4 vehicle, we don't cover hybrids. Done. I don't see why
5 there's a misrepresentation on behalf of Wynn's.

6 MR. DOMONOSKE: I thought we were talking
7 agency law first.

8 THE COURT: I'm talking about the whole
9 case. This case -- I mean, there's a case against --
10 there's a case against Armstrong. That's pending in
11 arbitration. I don't see any liability on behalf of
12 Wynn's in this case, under any theory. But I'll hear
13 what you have to say.

14 MR. DOMONOSKE: So, under agency law, the
15 actual agency is established by this dealer agreement.
16 The question is, for actual agency, what's the
17 limitation of that? The dealer agreement does authorize
18 Armstrong to give these documents to consumers. It
19 authorizes Armstrong to talk to the consumers about
20 these documents.

21 THE COURT: It authorizes Armstrong to only
22 sell these service contracts on eligible vehicles. This
23 is not an eligible vehicle, so when he goes ahead and
24 sells this contract and offers it and she signs up for
25 it and the money gets transferred to CAC, he didn't have

1 authority to do that. It's not an eligible vehicle.

2 MR. DOMONOSKE: I was trying to walk through
3 the elements of agency and I believe you've agreed that
4 he was an agent. It was just limitations in this
5 agreement.

6 THE COURT: I don't think he's an agent. I
7 think he's an independent contractor. I don't think
8 there's any basis to establish, under the Virginia
9 Supreme Court's principles of agency law, that Armstrong
10 is the agent of Wynn's. Armstrong was a car dealer, an
11 independent contractor, that offered as an option to its
12 customers to sign up with this extended service
13 contract. That's what this is. This is not an agency
14 relationship.

15 MR. DOMONOSKE: Your Honor, when I was using
16 the word agency, I wasn't trying to make any claim about
17 how far that agency relationship existed. I was just
18 saying that this authorizes him to give those service
19 contracts to customers. This authorizes him to discuss
20 those service contracts with customers and the question
21 is how far that authorization goes. He is an agent for
22 those first two purposes by the very terms of this
23 contract.

24 The reason I was talking about Harden v.
25 Alexandria Insurance Company is, in 1894, the Virginia

1 Supreme Court was trying to determine what to do about
2 an insurance policy that was changed by the insurance
3 company to be different than what was told to the
4 insured. In that case, there was a broker. This was a
5 general insurance broker. The Nationwide v. Patterson
6 case that occurs 100 years later and is a small fact
7 twist on this underlying case. But in Harden v.
8 Alexandria Insurance Co., in November, 1890, one G.W.
9 Lowell, whose occupation was general insurance business
10 at Big Stone Gap, Wise County, Virginia, went to see
11 W.S. Reese. So a general broker of insurance --

12 THE COURT: What's the cite to that case?

13 MR. DOMONOSKE: 18 Southeast 911 90 Virginia
14 413.

15 THE COURT: Go ahead.

16 MR. DOMONOSKE: He goes and he pays a
17 personal visit to W.S. Reese. In that visit, they
18 discuss insurance. This is not a question of someone
19 going to a Nationwide insurance salesman. This is a
20 general insurance broker who went to see W.S. Reese.
21 They strike a deal. They pay some money. They get the
22 policy. The policy goes up to the insurance company.
23 The insurance company puts amendments to the policy.
24 They send those amendments to him, but his store burns
25 down, he loses his inventory and the question is, does

1 the insurance limitation that was in the amendments that
2 were made by the insurance company apply or does what
3 G.W. Lowell, the general insurance broker apply? The
4 Virginia Supreme Court said --

5 THE COURT: What happened to those
6 amendments?

7 MR. DOMONOSKE: They were written down. They
8 were on the policy. They were in the building that
9 burned down, if you're asking physically what happened
10 to them.

11 THE COURT: Had Lowell gotten the
12 amendments?

13 MR. DOMONOSKE: He had actually gotten the
14 piece of mail and it was then burned down.

15 THE COURT: Okay.

16 MR. DOMONOSKE: Here's what the Virginia
17 Supreme Court ended up holding; that even though the
18 broker and the company position was that the company had
19 never issued a commission to him as their agent, and
20 they both said he was acting only as a broker, the
21 Virginia Supreme Court said, but this is playing upon
22 words, and the whole testimony and the transaction
23 itself shows that he was held out to the public as the
24 agent or intermediate of the company by and through whom
25 all transactions with the company by parties seeking or

1 having insurance must pass, subject to approval.

2 The insurance company furnished him with all
3 needful papers and blanks, responded to his acts,
4 approved permits of removal given by him, paid his rent,
5 thereby treating and holding him out as an agent to the
6 public.

7 The only thing different in there is paying
8 the rent and I mention that because this deal didn't go
9 down at his office. And furthermore, a general broker
10 doesn't tell a customer who pays the rent. The payment
11 of the rent is unnecessary for the analysis. The
12 important thing about the analysis is there was a
13 company who decided who would interact with the public
14 on their behalf to solicit business. What this dealer
15 agreement does is this dealer agreement says, in
16 Harrisonburg, Virginia, Armstrong Auto is authorized to
17 solicit business for Wynn's. My client can't call
18 Wynn's and get a service contract. There is only one
19 way my client interacts to get the service contract and
20 that's by and through an intermediary. The intermediary
21 is Armstrong Auto.

22 I have a hypothetical that I think shows
23 this. Let's say that Wynn's had approved this deal.
24 Let's say that there was never an ineligible --
25 actually, let's roll the hypothetical back. Let's say

1 it was a Honda Civic that was not a hybrid so that it
2 was eligible for this service contract. When Wynn's
3 then got this, it would be in place. They wouldn't void
4 it and the question would be, who interacted on Wynn's
5 behalf to solicit this contract? Who did Wynn's use to
6 solicit the contract? Wynn's uses dealers like Armstrong
7 Auto, like dealers nationwide. They have a form dealer
8 agreement and this dealer agreement authorizes those
9 dealers to solicit business for Wynn's. And in fact,
10 there's only one way --

11 THE COURT: Sure. There's a dealer
12 agreement that says a dealer will use its best efforts
13 to market contracts.

14 MR. DOMONOSKE: Yes.

15 THE COURT: That doesn't mean that Wynn's is
16 responsible for fraudulent or statements made by dealers
17 of which it has no knowledge and which are inconsistent
18 with the documents itself.

19 MR. DOMONOSKE: First, that is exactly what
20 the Virginia Supreme Court held in Harden v. Alexandria
21 Insurance. They held that indeed the company was bound
22 by the initial agreement that was made between the
23 people. They were bound by what was said. They could
24 not rely on what they sent in writing after their
25 intermediary, their chosen intermediary, had negotiated

1 the deal.

2 THE COURT: Well, you know, there's a very,
3 very long -- I'm trying to read that case as you're
4 talking. There is an incredibly long paragraph that
5 says the facts of that case are this. I didn't read
6 this case before now. I'm not sure it had been cited.
7 It may have. I don't know. But I'm not sure that this
8 case is square with the facts of that. I'll have to
9 study it because as with cases that date from the
10 1890's, the fact paragraph here is really long. It's
11 like more than a page. I'd have to study that.

12 But go ahead.

13 MR. DOMONOSKE: The point is that in the
14 Holiday Inn case, in the insurance -- I'm sorry, in the
15 hospital case, in the Green Giant example of the peas,
16 the principle is not using the intermediary to solicit
17 business --

18 THE COURT: Sure, they are. Sure, they are.
19 Just forget -- that's a goofy example. Just forget that
20 example.

21 MR. DOMONOSKE: In the Holiday Inn case and
22 in the medical malpractice case, the alleged principle
23 was not using the intermediary to get a contract that
24 then the alleged principle controlled. Here, Wynn's is
25 saying that was never a contract. We voided it. They

1 actually admit in their pleadings that the contract was
2 in effect and then they voided it. Right when this case
3 starts out, they talk about we voided the contract after
4 it was created. It is a contract directly with them.

5 In the Holiday Inn case, that overnight
6 visitor was not in the process of negotiating a contract
7 directly with Holiday Inn International.

8 In the med/mal case, the person was not
9 using the doctor to negotiate a contract with the
10 hospital. There's a fundamental difference between
11 those fact patterns and this fact pattern and in fact,
12 this fact pattern lines up exactly with the insurance
13 cases because there is a company that is using an
14 intermediary as the only way for a member of the public
15 to do contractual business with them. In fact, they
16 testified at their 30(b)(6) deposition that Armstrong
17 was their agent.

18 THE COURT: No, I read that page. I read
19 that page. That's page 139 of Mr. Armistero's
20 deposition. I read that page.

21 There was an old Virginia Supreme Court case
22 which I think sheds a little light on this. It was
23 abrogated for other reasons, but it's Virginia Iron and
24 Coal vs. Odle's Administrator. Here's the real problem
25 with what your argument is.

1 It says, in headnote one -- you know, this
2 case has been abrogated, but the principle that it talks
3 about is not abrogated. It says, it is insisted by
4 counsel for defendant that the doctor -- this was a
5 doctor case -- was the agent of the company and the
6 failure on the part of the agent to perform the services
7 contract performed by his principle is negligence and
8 breach of contract under the law.

9 This is the part of this thing that
10 interested me. Apparently, the word agent -- and this
11 case is old. Maybe I didn't go back to 1894, Mr.
12 Domonoske. I only went back to 1920. Apparently, the
13 word agent in the paragraph quoted is used in the
14 generic sense of representative, but the representative
15 may be what is usually and properly termed an agent or
16 he may be a servant. There's a well defined distinction
17 between the two. Usually the agent represents the
18 principle in the formation in the discharge of contracts
19 between third persons.

20 It talks about just the sort of -- the
21 difference between an agent and a representative. I'm
22 not sure this amounts to a hill of beans, but, you know,
23 the thing that is troubling here, I think that goes to
24 the point of Mr. Armenteros when he says -- he's not
25 talking in legal terms. He says the dealer is an agent

1 in the way of selling the product on behalf of CAC and
2 Wynn's Extended Care. Page 139 of his deposition. They
3 chose to do business with CAC and purchased the warranty
4 service contract. Basically, he's saying these guys are
5 there, they provide the service contract to the
6 customers, the customers can decide to sign up or not
7 with them. They sign up with them and we say -- if the
8 car had been eligible, would have been no problem. But
9 the car wasn't eligible here and Wynn's writes them
10 right back and says, not eligible.

11 Maybe this case is like your Harden case had
12 the car battery gone bad between the time this contract
13 is sent in and the time Wynn's says no deal, abrogate
14 it. That's like the fire in your Harden's case, as best
15 I can parse the facts sitting here in this argument.
16 But that's not the case. Wynn's writes the letter, says
17 not eligible, no contract. Then five or six months
18 later, three or four months later, whatever it is, her
19 battery goes bad.

20 Why in the world should Wynn's be held
21 responsible for that? Wynn's did everything it could to
22 say that there's no agreement here. They refunded the
23 money. There's no agreement here. Wynn's cannot, under
24 the law, be held responsible for a statement by
25 Armstrong that is flat inconsistent with a writing from

1 Wynn's. It would be ignoring that. That's nonsense.

2 MR. DOMONOSKE: All right, two things.

3 First, they continue to say they refunded
4 the money. We tried to do discovery and they would not
5 give us the cash flow documents. We have not seen the
6 refund of that money.

7 THE COURT: It doesn't matter. Whether
8 Wynn's gave the money back to CAC or not doesn't matter.
9 What matters is what Wynn's told Ms. Bradley and Wynn's
10 told Ms. Bradley this car is not eligible. She goes to
11 Armstrong. Armstrong says -- if there's fraud here, and
12 I can't see that there's any representation based on
13 what you alleged in paragraph 82, that representation is
14 that it was covered -- well, that's flat inconsistent
15 with the contract documents. There's no fraud there.
16 So the alleged fraud here, if there is any fraud, is
17 when Armstrong says ignore the letter from Wynn's.
18 Ignore it. How can Wynn's be held responsible for that?

19 I understand the letter says contact your
20 dealer. But it doesn't say, oh, if your dealer lies to
21 you about whether this letter is valid or not that we
22 should be held liable. I mean, that's crazy. What more
23 could Wynn's have done, Mr. Domonoske?

24 MR. DOMONOSKE: Well, one thing they could
25 have done is after they had 103 ineligible service

1 contracts sold on electric vehicles by dealers who were
2 making mistakes, they could have done something to keep
3 that from occurring.

4 THE COURT: They did. They wrote a letter
5 right here like within a week saying there's no contract
6 here. You may have an argument -- if, for example, this
7 car had gone bad between the time the contract is
8 entered and the time Wynn's sends this letter or
9 somewhere around there, this battery had gone bad and
10 poor Ms. Bradley thinks I have a contract with Wynn's
11 and in the meantime -- I think that's that Harden case
12 you're talking about. If the car burns up or like in
13 that case, the liquor factory burns up in the interim,
14 you've got an argument as to agency and binding Wynn's
15 then. But not here, not where Wynn's says no deal, no
16 deal. You've got a claim. Ms. Bradley's got a claim
17 against Armstrong for misrepresenting to say ignore the
18 letter from Wynn's. That is out and out fraud and I
19 can't see how under any theory of the law Wynn's can be
20 held responsible for a dealer saying ignore an express
21 writing from Wynn's. And I want to hear your best
22 argument on that because that's my biggest problem with
23 this case.

24 MR. DOMONOSKE: All right.

25 We have this letter, August 28th.

1 THE COURT: Yes, sir.

2 MR. DOMONOSKE: The letter says:

3 "Regrettably, your contract has been voided due to the
4 following. This vehicle model is ineligible for
5 coverage. Please contact your selling dealership with
6 any questions."

7 First thing about the letter, it's not
8 signed by anyone. It's clearly a form letter, and I
9 believe that's important.

10 Second, it tells her what she should do if
11 she has any questions. And she has a question. Her
12 question is, how can this be true? You checked on the
13 computer. We discussed this. I told you I only wanted
14 this car if I have coverage. You went and checked and
15 said, there's coverage. She has questions. And they're
16 reasonable questions. They're reasonable questions
17 because this deal never would have happened but for
18 Armstrong checking something and coming back and telling
19 her, it's eligible, you have coverage. She relied on
20 that statement -- "it's eligible, you have coverage,"
21 and she signed a bunch of documents and she agreed to
22 pay for this and she paid \$1,200 down.

23 THE COURT: And it wasn't eligible. There's
24 no dispute. Armstrong's representation that you say he
25 says it was eligible is false.

1 MR. DOMONOSKE: Yes.

2 THE COURT: Under the dealer agreement, how
3 can Wynn's be responsible for that because Armstrong is
4 only authorized, the extent of the agency is to sell
5 eligible vehicles.

6 MR. DOMONOSKE: First, she doesn't have the
7 dealer agreement.

8 THE COURT: So what?

9 MR. DOMONOSKE: I'm talking about how she
10 reacted to this letter. You're telling me she acted
11 unreasonably.

12 THE COURT: No, I'm not saying that. What
13 I'm saying is, all right, her reliance on a
14 representation by Armstrong that it's covered, it's
15 covered, it's part of the deal, is unreasonable in view
16 of the terms of the contract itself. I'm not saying
17 when she gets this letter, when she calls up Armstrong
18 and says what am I supposed to do about that, that she
19 acted unreasonably. I'm not blaming Ms. Bradley for
20 that. But how can Wynn's be held liable for this
21 statement made by Armstrong that is inconsistent with
22 exactly what Wynn's is telling her in writing?

23 MR. DOMONOSKE: I was getting there.

24 THE COURT: Go ahead.

25 MR. DOMONOSKE: She gets this letter. The

1 letter tells her two things: Your contract has been
2 voided. If you have questions, contact your selling
3 dealership. She does exactly what Wynn's tells her to
4 do because she does have questions.

5 THE COURT: I got that, but so what?

6 MR. DOMONOSKE: So she goes back to
7 Armstrong and she says, what does this letter mean? How
8 can I not have coverage?

9 THE COURT: Why doesn't she -- if what she
10 was doing was reasonable, why doesn't she call the
11 number on the letter and say, hey, I got this letter, my
12 dealer says this. What's up? She doesn't do that. So
13 maybe there is a fact question as to whether or not her
14 reliance is reasonable.

15 I'm talking about whether or not as a matter
16 of law Wynn's can be held liable for a representation by
17 the dealer that is flat inconsistent with its writing.
18 I don't see it. Tell me why.

19 You're saying -- I know what your argument
20 is. It's because the letter says "contact your dealer."

21 MR. DOMONOSKE: Yes.

22 She had questions and she is a better
23 respondent to Wynn's writing than apparently they think
24 Armstrong Auto is. They think Armstrong Auto violated
25 the terms of that rate card. There actually is an issue

1 whether Armstrong reasonably violated the terms of that
2 rate card because his understanding of electric vehicle
3 is something different than what they say their
4 understanding of electric vehicle is. But they're
5 saying Armstrong screwed up because he didn't do what we
6 told him to do and therefore, it's all Armstrong's fault
7 because Armstrong didn't do what we told him to do.

8 Ms. Bradley did exactly what they told her
9 to do. They said contact your selling dealership with
10 any questions. She followed their instructions to the
11 very word, to the very letter. That's why they're
12 responsible for what Armstrong said because Armstrong
13 told her, look, that's just a form letter, ignore it.
14 It's a computer glitch.

15 Now, the next question is you apparently
16 think it was unreasonable for her to believe him. I
17 understand that position. I've been practicing law in
18 Virginia court for a long time.

19 THE COURT: What I'm saying is -- no, I'm
20 not blaming Ms. Bradley. What I'm saying is -- what I'm
21 saying is, how, under the law, under this dealer
22 agreement and under the relationship where Wynn's had no
23 conversation with Armstrong, had no control over
24 Armstrong except in this writing, how can Wynn's be held
25 liable for -- let's assume it is an out and out lie, a

1 deliberate falsehood by Armstrong. How can Wynn's be
2 held liable for that where it is inconsistent with the
3 terms of the letter itself?

4 MR. DOMONOSKE: She reasonably relied on
5 that representation by them.

6 THE COURT: Reasonable reliance is the
7 second point. Where is the liability attaching to
8 Wynn's for a statement by Armstrong inconsistent with
9 everything that's here in terms of the relationship
10 between Wynn's and Armstrong? There's no agency
11 relationship that allows Armstrong to disregard what
12 Wynn's is telling Ms. Bradley. Even if there was one,
13 it's outside the scope. Armstrong has no authority to
14 tell Ms. Bradley, oh, ignore that letter, just ignore
15 it. There's no authority to do that. So even if there
16 was an agency relationship, it exceeds the scope.

17 Go ahead.

18 MR. DOMONOSKE: All right.

19 There's no response to it. I'll take the
20 second one up first because the second one follows
21 exactly what you just said. Even if there was an
22 agency, it exceeds the scope.

23 If there was an agency and it exceeds the
24 scope, the legal avenue for her relief is the apparent
25 authority of the agent, not actual agency. The actual

1 agency -- under this analysis, the actual agency is
2 limited. This exceeds that limitation. So for these
3 purposes, I'm agreeing with you on that. The question
4 is under the apparent authority of an agency --

5 THE COURT: Apparent authority must be based
6 on representation by the principle and all you have is
7 the letter from them saying no coverage, this vehicle is
8 not eligible and if you have questions, contact your
9 dealer. That is your only evidence to support apparent
10 authority.

11 MR. DOMONOSKE: For apparent authority, I
12 was talking about specifically about when she was at the
13 dealership and Armstrong said ignore the letter.

14 THE COURT: I think she called in, didn't
15 she?

16 MR. DOMONOSKE: She both talked on the phone
17 and she was there.

18 This actually is a jury issue because
19 Armstrong said, I never said that. There is a dispute
20 --

21 THE COURT: Assume for the sake of argument
22 that Armstrong did.

23 MR. DOMONOSKE: Apparent authority --

24 THE COURT: That's an issue in the
25 arbitration against Armstrong. It's not an issue in

1 this case.

2 MR. DOMONOSKE: It's the authority a third
3 person reasonably believes an agent has based on
4 dealings with the principle, even if the principle did
5 not actually give it.

6 Did she reasonably believe that Armstrong
7 had authority to answer her questions based upon
8 dealings with the principle? Here, we have a letter that
9 says, if you have any questions, contact your selling
10 dealership. Our legal position, it's nothing more than
11 it was reasonable for her to believe that Armstrong had
12 authority to answer her questions. That's the apparent
13 authority of an agent. They gave that apparent
14 authority to Armstrong when they sent this letter.

15 If the Court says there's nothing in the
16 dealer agreement that actually makes him an agent at
17 all, then we're talking about agent by estoppel, which
18 is, even if he doesn't start out being an agent, did
19 someone give the appearance that he had authority to be
20 the agent? Well, guess what? The letter does. The
21 letter says, please contact your selling dealership with
22 any questions. This letter clothed Armstrong with
23 authority to answer her questions. She went there and
24 Armstrong said, look, that's a form letter. Ignore it.
25 That's just a glitch. Of course you have the service

1 contract. I told you, you did. I charged you for it.
2 You have the coverage. You only wanted the car if you
3 had the coverage. And she believed him.

4 Furthermore, the dealer kit, I think, is
5 evidence there was actual agency. Armstrong has a
6 dealer kit. Their Interrogatory says we provide that to
7 our dealers nationwide.

8 THE COURT: That's irrelevant to this case
9 because there's no evidence Ms. Bradley ever saw it.

10 MR. DOMONOSKE: Your Honor, can we back up
11 just a minute?

12 Here's the dealer agreement. We agree the
13 dealer agreement is relevant to the actual agency. I'm
14 talking about actual agency. Under actual agency, they
15 tell their dealers, you have authority to select the
16 right service contract. They have a brochure that their
17 dealers are to give to consumers that say ask your
18 dealer which is the right one.

19 This dealer agreement is really interesting
20 because they say the dealer agreement is the complete
21 agreement, but there's a rate card that is part of the
22 dealer agreement, which is that rate card they've given
23 the Court. They've never actually shown us the dealer
24 cost document. It is impossible for me to read this
25 agreement and understand how the rate card fits in with

1 the dollar flow on this.

2 THE COURT: That's beside the point. I want
3 to stay on task. I don't want to get into this whole
4 Wynn's CAC conspiracy theory that you have because
5 that's not the issue in this case.

6 Let's go back to the letter of August 28,
7 2012.

8 Ms. Bradley testified she didn't even -- I
9 mean, in order to have apparent authority or agency by
10 estoppel or any of that stuff in this case, Ms.
11 Armstrong (sic) has to have information that the
12 principle, the principle is making some representations
13 or indicating to the third party that, yeah, you should
14 look to the agent. Ms. Bradley testifies I got this
15 letter. I don't even know who it came from. I had no
16 idea this came from Wynn's. I had no idea. How can
17 Wynn's be bound by it? How can agency by estoppel be
18 created here when Ms. Bradley herself doesn't even know
19 that Wynn's sent this letter?

20 MR. DOMONOSKE: So she doesn't know the
21 name, Wynn's Extended Care. She doesn't know the name
22 of the corporate entity. Your Honor, I've been down
23 there and deposed this person. I'm not sure who Wynn's
24 Extended Care is. They apparently have no employees.
25 All their employees are apparently employees of Phoenix

1 America. Now, who pays the Phoenix America employees, I
2 have no idea. She didn't know the name. She did know
3 this is a letter about my service contract that I
4 bought. She doesn't have to know Wynn's Extended Care,
5 Inc., is the formal name of the service contract holder.

6 THE COURT: That's fine. You can make that
7 argument, but the fact of the matter is, I don't see how
8 Wynn's can be held liable in a fraud case where you have
9 to prove fraud by clear and convincing evidence, how a
10 reasonable jury could possibly hold Wynn's liable for --
11 somehow be responsible for a statement by Armstrong that
12 is flat inconsistent with the letter Ms. Bradley got. I
13 just don't see it.

14 MR. DOMONOSKE: All right.

15 What I hear you saying is that as a matter
16 of law, it was not reasonable for her to believe his
17 statement.

18 THE COURT: What I'm saying is, as a matter
19 of law, there's no agency relationship here. There's no
20 agency relationship in fact. There's no agency
21 relationship by estoppel. There's no apparent agency
22 relationship. Wynn's had no dealings with these people.
23 All Wynn's did is allow them to sell these agency
24 contracts. Armstrong goes off on his own, signs up an
25 ineligible vehicle. Wynn's responds immediately this

1 vehicle is ineligible and Armstrong says ignore that.

2 Your case is against Armstrong. Wynn's did
3 absolutely what it was supposed to do under these
4 documents. There's no fraud here, no constructive fraud
5 here. None. Wynn's gives the dealers applications for
6 service contracts. It says right on its face it's an
7 application for a service contract. Wynn's responds
8 immediately and says no, this car is ineligible.

9 You may have an argument had the car gone
10 bad between the time this application is sent in to
11 Wynn's and the time they responded. That may be your
12 Harden v. Nationwide case. Not here.

13 If you have a claim, it's against Armstrong.
14 There is no claim against Wynn's under fraud or
15 constructive fraud. I see under no theory that a
16 reasonable jury -- as a matter of law, the Court finds
17 there is no agency relationship. These documents do not
18 establish an agency relationship. There is nothing here
19 -- there is nothing here, no evidence of control at all.
20 The record is clear. Wynn's does not control Armstrong
21 at all. No evidence of that. Control is important
22 because if Wynn's had controlled Armstrong, then there
23 may be some rationale and theory under the agency law
24 why Wynn's should be liable for representations made by
25 Armstrong. But there's no control here. There's no

1 evidence of procedures and all that other stuff. The
2 only evidence we've got in this case is this dealer
3 agreement and this letter and what does this dealer
4 agreement say? Armstrong can only sell eligible
5 vehicles. What did Armstrong do? He sold an ineligible
6 vehicle. What does Wynn's do? Wynn's responds
7 immediately. Wynn's responds immediately that there's
8 no contract here, your application is rejected.

9 In the Harden case that you talk about,
10 there was an actual contract issue. There was an actual
11 policy issued in that case. In this case, there is no
12 agreement reached between Wynn's and Ms. Bradley. She
13 signs an application for a service contract on an
14 ineligible vehicle. Wynn's responds and says this
15 vehicle is not eligible. End of story.

16 She has a claim against Armstrong. She has
17 a claim for a misrepresentation, but I see no basis and
18 I believe no reasonable jury could conclude that there
19 is an -- the Court finds as a matter of law, there's no
20 agency relationship based on the documents. So I reject
21 the notion of actual agency.

22 This letter of August 28th, which is the
23 only communication between Penny Bradley and Wynn's,
24 does not create apparent agency or agency by estoppel or
25 anything like that. This letter says there's no

1 agreement here, no contract.

2 You may have an argument, and this would be
3 a different case, had the battery gone bad between the
4 time the application is signed and the time the letter
5 is sent. You may have a case against Wynn's then, but
6 it didn't happen. It wasn't until months later. I find
7 as a matter of law that there is no agency relationship
8 here.

9 I find as to paragraph 82 of the complaint,
10 the representation that this was included in the
11 transaction in part of the deal automatically included,
12 the reliance on that is flat inconsistent with the
13 documents in this case. Even if there was an agency
14 relationship as regards the representation in paragraph
15 82 -- doesn't exist. The documents say this is an
16 application. Right above her signature, this is an
17 optional contract. The retail sales agreement says
18 optional contract and you sign up for it. It's
19 separately priced. It's absolutely clear from the
20 documents what is here.

21 And there's no basis for paragraph 83 to say
22 that Wynn's authorized Armstrong in saying that this was
23 part of the deal. It's not. The documents itself that
24 she signed say I understand that the information may be
25 subject to verification. This application may be

1 rejected if any of the information is incorrect or if
2 the vehicle is not eligible. She signed that. She knew
3 that. What does Wynn's do? This document is dated -- I
4 can't tell what the date of this is, but very shortly
5 after this sales contract is done, Wynn's writes her a
6 letter and says, sorry, sorry, sorry, ma'am; ineligible
7 for coverage.

8 Paragraphs 82 and 83, there's no basis for
9 any agency there. It's inconsistent with the agreement.
10 There are no facts that support it. No reasonable jury
11 could find agency.

12 With regard to paragraph 86, Wynn's
13 misrepresented that the August 28th letter was an error
14 and should be ignored. Wynn's never did that. There's
15 no evidence to support that.

16 If anybody's responsible here, it's
17 Armstrong for making a statement that's inconsistent
18 with the letter.

19 So the Court finds as a matter of law
20 there's no agency and I'm dismissing -- I'm granting
21 summary judgment to the defendant for the first cause of
22 action, fraud and constructive fraud, because there is
23 no agency in this case: Actual, apparent, by estoppel,
24 none, zero.

25 Secondly, even if there was, as I've

1 indicated, there's no reasonable reliance by Ms. Bradley
2 in paragraphs 82 and 83. There's absolutely no basis
3 under the law for which Wynn's can be held liable for
4 Armstrong's subsequent representation after August 28,
5 2012, to ignore its written letter.

6 If there is a case here -- and I feel bad
7 for Ms. Bradley because she bought this car and the
8 battery went bad. I'm sure -- but I feel bad for her,
9 but her claim's against the dealer. That's who her
10 claim is against, for making statements inconsistent
11 with this letter of August 28th.

12 With regard to the Magnuson-Moss claim --
13 so, for those reasons, I find there is no agency in this
14 case. None. The document don't establish it.

15 In addition, I find paragraphs 82 and 83 and
16 86 to be flatly contradicted by the evidence in this
17 case. 82 and 83, the allegation is that Wynn's agent
18 misrepresented that the warranty was included in the
19 transaction. Well, A, no agency; B, the documents on
20 their face don't support a notion that the warranty
21 itself was somehow inside of the sales document. It's
22 clear, the warranty was an optional warranty coverage.
23 She signed right there on the retail sales contract
24 saying optional warranty coverage. She signed it. It's
25 there. She can't now claim some sort of fraud against

1 Wynn's on 82, 83.

2 86, like I said, there's no facts that
3 suggest that Wynn's should be liable for Armstrong's
4 representation if indeed it happened, and I take the
5 defendant's case at its strongest that Armstrong says
6 ignore it, it's a computer glitch, ignore the letter.
7 Wynn's is not responsible for that under the law and
8 that's nonsense. There's no way any reasonable juror
9 could conclude that Wynn's is responsible for that
10 representation.

11 On the VCPA, the Court finds there is no
12 contract here. This was an application which was
13 rejected. There is no contract here. You've got to
14 have a contract under the VCPA -- I'm sorry, I'm sorry.
15 I am completely wrong. I'm talking about the third
16 cause of action, Magnuson-Moss act.

17 There is no contract here. Wynn's does what
18 it does. It says, give you an application, you fill it
19 out. Wynn's does its due diligence. It looks at the
20 car and says, gosh, we don't cover these cars and it's
21 ineligible. They write her back right away. There's no
22 basis to impose liability on Wynn's for doing exactly
23 what it did in this case, which was reject an
24 application from Ms. Bradley.

25 So I dismiss the third cause of action under

1 the Magnuson-Moss Warranty Trade Improvement Act.

2 Under the VCPA, and I'm sorry I misstated
3 that, under the second cause of action, there is no VCPA
4 claim here because there is no agency. There is no --
5 paragraph 93 says, she says by charging for coverage
6 that was not provided by misrepresenting that coverage
7 was provided. These documents say it is an application
8 for an optional warranty coverage and it's only binding
9 when accepted. It's not accepted here. There is no
10 violation of the VCPA.

11 Give me a minute. I'll be back in a moment.

12 I am dismissing -- I'm granting summary
13 judgment to the defendant for those reasons on Counts 1,
14 2 and 3. No agency for Counts 1 and 2. No contract on
15 Counts 1 and 2.

16 Give me a minute and I'll be right back.

17 Ask the Marshal to declare a recess.

18 (Recess at 10:50 a.m. until 10:53 a.m.)

19 To further distinguish the Harden case that
20 Mr. Domonoske cites, the Court would note, A, there was
21 no extended discussion in that case as to the level of
22 control. Here, we know what the control is and it's
23 non-existent. There is no control. We do know in the
24 Harden case, the insurance agent paid the rent of the
25 agent. Second, in Harden, there was a contract in place

1 and here, there was none. I think as a matter of
2 equity, as a matter of law, that Harden case may make
3 some sense because there was the issue about whether the
4 insured got the letter, this new policy. Here, she got
5 it. She got the letter. The car didn't go bad in the
6 meantime. There's no case here.

7 For the same reasons, the Court denies the
8 motion to amend the counterclaim. Those are additional
9 representations which rely on an agency theory which the
10 Court rejects. So I deny the motion to amend the
11 counterclaim.

12 Now, there is a host of other extraneous
13 issues out there dealing with motions for sanctions,
14 motions to seal, motions to unseal that are out there.
15 In the Court's view, all of those deal with, by and
16 large, the relationship between Wynn's and CAC. All of
17 those deal with this theory that the plaintiffs have
18 that there's some conspiracy here that Wynn's and CAC
19 try to make money by getting people to buy ineligible
20 contracts, which is just flatly contradicted by the
21 August 28th letter, and that just doesn't make any sense
22 whatsoever. But plaintiffs have this theory and they
23 tried to pursue it and they pursued it in the discovery
24 in this case, to the nine's.

25 I am dismissing all other motions in this

1 case, including the motion for sanctions, including all
2 the motions to seal, all the motions for discovery, all
3 of those issues. In the Court's view -- and I've read
4 all of them. I've looked at these documents in camera.
5 I've looked at all this stuff. I've studied them all
6 and all of those go to the relationship between Wynn's
7 and CAC, which is a non-issue in this case because the
8 Court finds no agency -- no agency that could possibly
9 bind Wynn's to the fraud that the plaintiff alleges in
10 this case.

11 Counts 82 and 83, as I've said are flat
12 inconsistent with the documents. Even if there was an
13 agency, there's no factual basis for that and no way she
14 could reasonably rely.

15 As to Count 86, there is no reasonable jury
16 that could conclude Wynn's is responsible for the
17 representation in this case that Armstrong made to
18 ignore the written letter. It's nonsense. There's no
19 possible way to bind Wynn's for that.

20 So I'm going to dismiss as moot all other
21 pending motions, including the motion for sanctions.
22 I'm dismissing them all as moot.

23 MR. DOMONOSKE: Can I be heard on one point
24 that won't challenge your order?

25 THE COURT: Mr. Domonoske, it's always a

1 pleasure to have you here. I'll be happy to hear what
2 you have to say.

3 MR. DOMONOSKE: You characterized these many
4 discovery motions and motion for sanctions about our
5 theory of the case that Wynn's is conspiring with other
6 people to make money by having ineligible service
7 contracts sold and I want to be very clear what we were
8 doing in this case. We were trying to conduct discovery
9 on their defense. That's what you articulated and
10 called our theory and that was never once our theory.
11 Our theory was the legal issues which we've talked
12 about; whether there was agency relationship, whether
13 that August 28th letter clothed Armstrong with apparent
14 authority. In response -- and we lost that and that's
15 fine.

16 THE COURT: We just flat disagree on that
17 and maybe the Fourth Circuit will tell me I'm wrong.

18 MR. DOMONOSKE: From the very beginning
19 though, they raised a defense that they wanted to make
20 in response to our argument, which was, look, we never
21 would have done it because there's no way we're making
22 any money when that happens.

23 THE COURT: I understand.

24 MR. DOMONOSKE: So we were conducting
25 discovery on their defense.

1 THE COURT: I'm not faulting you for what
2 you have done in this case. All this motion to seal
3 stuff and the discovery disputes did get a little bit
4 out of hand in this case, but my only point is this.
5 Most of that issue that you took discovery on directed
6 to their defense that they wouldn't take money and this
7 issue of a secret profit-sharing plan between CAC and
8 Wynn's directed to their defense, all of that, at this
9 point, given my ruling that there is no action, no basis
10 for the fraud under Count 1, no basis for the VCPA under
11 Count 2, no basis for Magnuson-Moss under Count 3, all
12 that is immaterial. All that is a side show and beside
13 the point.

14 I'm denying all those motions, each side;
15 the defendant's motion and the plaintiff's motions. I'm
16 denying them all as moot because by oral order, I'm
17 dismissing this case with prejudice.

1 for that, under the law.

2 Secondly, at the end of the day, when Wynn's
3 sends a letter back and says this car is not covered,
4 Armstrong, taking the plaintiff's case at its best says
5 it is covered, ignore it, Wynn's is not responsible for
6 that.

7 I understand you disagree, Mr. Domonoske.
8 Probably disagree strenuously and I credit your zealous
9 advocacy in this case, but I find no agency. I am
10 dismissing the case with prejudice for the reasons I
11 have said.

12 Thank you.

13 Ask the Marshal to declare a recess.

14 (Recess).

15

16

17

18 "I certify that the foregoing is a correct transcript
19 from the record of proceedings in the above-entitled
20 matter.

21

22

23 /s/ Sonia Ferris

November 19, 2014"

24

25